SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 142

JOE GOSSMAN,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA, ET AL.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

JURISDICTIONAL STATEMENT

That the rulings of the Courts below were of such nature so as to bring the case within the Statutory provisions of (R. S. 709) Title 28 U. S. C. 1257 page 88, whereby jurisdiction is conferred on this Court; That in being denied bail, and having been found guilty of an offense positively not included in the charge, the validity of U. S. Revised Statutes secs. 1015 and 1035 have been drawn into question; That 28 days after having been denied a hearing by the Supreme Court of the State of California, on the 16th day of Feb. 1950, appeal was settled, defendant was finally given credit for having served sentence, the bond on appeal

was exonerated, and the case has been concluded in the Court of first instance (Judge Walter S. Gates presiding).

> "Sec. 31 Cal. Veh. Code, defines a 'Vehicle' as a device in, upon or by which any person or property is or may be propelled, moved or drawn upon a highway, excepting a device moved by human power or used exclusively upon stationary rails or tracks."

Which is repugnant to the Constitution Tit. 1 sec. 4, defines "Vehicle" as including all means of land transportation (U. S. C.) (App. Op. Br. p. 30, Rep. Br. p. 12); That the validity of sections 501 and 502 Cal. Veh. Code were raised in App. Op. Br. p. 26 & 29, Rep. Br. p. 2 & 12, wherein appellant set forth that sec. 501 does not include the Words "It is unlawful for any person who is under the influence of intoxicating liquor to drive a vehicle upon any highway", also appellant pointed out legislative failure to enact a statute defining what it is or consists of to be under such influence, likewise that interpolation is forbidden and/or the decision was against the validity of R. S. U. S. 1035 and Title I, U. S. C. A. VI, Constitutional Construction and interpretation of Words VI. Title 1 U. S. C. A. VI, the maxim of jurisprudence that penal Statutes must be strictly construed is set forth in App. Rep. Br. p. 2, 9 also in U. S.-N. Y. and U. S. Utah "Crime MUST be defined with appropriate definiteness and there MUST be ascertainable, as well as reasonable standards of guilt," *Winters* v. *Peo. of State of N. Y.*, 68 S. Ct. 665; 333 U. S. 507; 92 L. Ed.; *Musser* v. *State of Utah*, 68 S. Ct. 397; 333 U. S. 95; That in (supra) appellant's briefs the validity of Sections 501 and 502 were assailed "The validity of a Statute is drawn into question whenever the power to enact it, as it is by its terms, or is made to read by construction, is fairly open to denial, and is denied" *Miller* v. *Cornwall R. Co.*,

Pa. 1897, 18 S. Ct. 34; 168 U. S. 132; 42 L. Ed. 409; In regard to the applicable test to ascertain guilt, Los Angeles Police Dept. rule 520 has never been enacted into law, "It is not competent to delegate to a Department the power to declare what facts shall constitute an offense, *U. S.* v. *Louisville R. Co.*, D. C. Ala. 1910; 176 F. 942; U. S. C. A. Art. I sec. 1 "There can be no valid delegation of legislative authority" *Prather* v. *U. S.*, 17 S. Ct. 997, 164 U. S. 452, 41 L. Ed. 510; said federal questions were raised in App. Op. Brief p. 29. Also on p. 32 claim was set forth involving violation of Const. of U. S. Art. VI sec. 2, Amendments IV, V, VI, VII, VIII, XIV, U. S. Revised Statutes sec. 1917, 1979, 1982, 5504, 5508, 5509, 5510, 5534-36. Conspiracy is shown in Clerks Tr. p. 11, 12, 13, & 15 and set forth in App. Op. Br. p. 23 & 31; attached are petitions to, and denial by the State Supreme Court and opinion of the District Court of Appeal refusing to consider substantial rights set forth in appellant's briefs.

(S.) JOE GOSSMAN.

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IN THE

Supreme Court of the United States

October Term, 1949

No.....

JOE GOSSMAN,

Appellant and Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, *et al.*,

Appellee and Respondent.

APPELLANT'S BRIEF

Opposing Motion of Appellee to Dismiss Appeal and Supporting Petition for Writ of Certiorari.

Comes now Joe Gossman, appellant and petitioner in the above entitled cause, and respectfully presents the following grounds upon which it is contended the questions involved are substantial and confer jurisdiction on this Court (*Zucht v. King*, 260 U. S. 174, 176, 177) under Title 28, U. S. C., Section 1257, and U. S. R. S.

Jurisdictional statements and assignment of errors in addition to those presented with petition for appeal and by reason of which the appeal was allowed herein, are contained in appellant's opening brief, pages 25 to 57, and appellant's entire reply brief, and are in effect an assignment of errors and charges alleged.

Appellant has been informed that the official reports from the courts below are in 95 A. C. A. 342; P. 2d

585; that on page 7 in appellee's statement opposing jurisdiction and on page 4 of the opinion from said court the case of *Lewis v. People*, 4 Cal. App. 2d Supp. 775 (37 P. 2d 752), is cited as an authority to uphold errors, but is more favorable to appellant herein under Section 502, Vehicle Code.

Said case is not applicable as a companion case but more as an illustration to show denial of equal protection under the law. Lewis was not charged with Sections 501 nor 502, Vehicle Code, but it was held that the complaint was insufficient and must state that the offense occurred on a public highway, and is one of the reasons why the judgment of conviction under Section 367e, Penal Code, was reversed and set aside.

Your appellant was not charged with Section 502 and the complaint did not allege that the driving was on any highway, public or private, under Section 1159, Penal Code of California; only the jury may find the defendant guilty of any offense which is necessarily included in that with which he is charged, and is applicable to such crimes as are divided into degrees such as murder, rape, burglary, etc.

On page 5 of its opinion the court below cites *People v. Stanley*, 13 Cal. App. 2d 559 (57 P. 2d 146), in which it was held that "In a prosecution for violation of 501, Vehicle Code it was unnecessary that the information contain an allegation that the offense was committed on a public highway" (which is also a point in appellant's favor). Section 502 declares (a) "It is unlawful for any person who is under the influence of intoxicating liquor to drive a vehicle upon any highway." These words are not included in Section 501, Vehicle Code, therefore it has always been my contention that any person charged

with Section 501 cannot be convicted of 502. Stanley was charged with and convicted of Section 501, Vehicle Code, and is an illustration to this Court as one of the methods used by attorneys in functioning the courts in Los Angeles as a racket of extortion; and encouraging the continuance in such proceeding from a corrupt motive of passion or interest in violation of Section 6068, Business and Professions Code of California. (See App. Op. Br. p. 31, lines 1 to 10; *People v. Lee*, 72 P. 2d 572, 573.)

As a final authority said court mentions *People v. Kehoe*, 33 Cal. 2d 711 (204 P. 2d 321), in which it was held that Section 503, Vehicle Code, is not an offense included within grand theft as defined by Section 487, Penal Code: "3. When the property taken is an automobile;" so the judgment of conviction under Section 503 was reversed and set aside. But please take notice that Section 503, Vehicle Code, defines driving, TAKING, or stealing a vehicle without the consent of the owner thereof, as a felony; and Section 487, Penal Code, certainly is included therein.

For such decision the only rational and logical reason must be because each and every word contained in Section 503, Vehicle Code, are not also contained in Section 487, Penal Code. See *State v. Marshall*, 220 N. W. 106, 206 Iowa 373:

> "Where certain elements of crime charged may be taken away, leaving necessary elements for another complete crime, latter may be termed an 'included offense' within the provisions of the Code." (1927, Iowa, Sec. 13920.)

This cannot be done in California with Sections 501 and 502, Vehicle Code; Section 1, short title, decidedly not of California, which should invalidate the entire code.

That said opinion of the lower court in the instant case concludes with the statement:

> "We have examined the many other points argued by appellant and find them without support in the record, or lacking in merit for other reasons." (The judgment was affirmed.)

This conclusion, like appellee's in his motion to dismiss, is an obvious subterfuge to evade consideration of federal issues and/or Constitutional authorities of the United States, set up, and claimed under, in appellant's briefs; by which the jurisdiction of this Court is invoked. *(Id.)*

With further reference to said court's final conclusion in its opinion, the many other points set forth and argued in appellant's briefs consist of federal questions as well as issues raised, under the Constitution, statutes and laws of the United States including the United States Code, Title 28, Section 1257. Appellant states furthermore:

That appellee in his statement opposing jurisdiction cites and set forth on pages 3, 4 and 5 thirteen or more federal questions raised in appellant's brief on record and appellee positively asserts three thereof which are also supported by the record directly and by construction in view of the facts that defendant was not properly represented by a proper counsel and essential parts of the Reporter's Transcript have been falsified so as to make a case.

That during the preliminary examination of the prosecution, Sam Cason assumed all blame and responsibility

for the collision, testifying that he did not see the defendant nor his car until after he hit defendant's car and there was no other substantial evidence to constitute probable and reasonable cause for the arrest, which raised a federal issue, and was pointed out to Attorney Kermit J. Morgan who admitted the same, but instead of making a motion to dismiss as suggested by defendant, Mr. Morgan advised a plea of guilty of Section 502, Vehicle Code, admitting 502 was not included in the charge; then Mr. Morgan falsely moved and acted so as to maintain the prejudicial proceeding; and misbehaved by wilfully neglecting to do his duty as counsel or attorney, thereby violating his oath of office and U. S. R. S., Sections 5397, 5393, 5336, 5406, 5407, 1979, as supported by the record, thereby raising federal issues.

That the validity of a state statute was drawn in question a short time before and on the day of trial Mr. Morgan again urged and advised appellant to plead guilty to Section 502; appellant refused and pointed out that if it were made to appear or proven that any person did have a few drinks of liquor or beer, he could not be lawfully convicted of being "under the influence of intoxicating liquor." (As a matter of fact a person can only be either drunk or intoxicated.)

A fair and impartial trial was not had nor intended, again raising federal issues under the Constitution, Article VI, Section 2; Amendments V, VI and XIV, U. S. R. S. 1980 and others mentioned before. That previous to the (mock) trial in refusing Attorney Morgan's suggestion to plead guilty of violation of Section 502, Vehicle Code, appellant said to Mr. Morgan:

"You ought to know that I am not guilty, but if you think I am, why not go to the District Attorney

and have the charge changed to 502; from the testimony we both heard during the preliminary I cannot be convicted of neither 501 nor 502."

Obviously Kermit J. Morgan was a party to the change or falsification of the record, because during every discussion of the testimony heard at the preliminary hearing he never allowed appellant to see the transcript nor inform defendant of the change.

Reference is made to the record in appellant's briefs to be transmitted herein that in Reporter's Transcript, page 136, lines 1 to 5, appellant actually stated (as in Op. Br. p. 24, lines 9 to 15):

> "It seems to me that those who have the power of government in their hands should learn the lesson not to subject a law abiding citizen of these United States to the deprivation of rights, privileges or immunities to which I am entitled, and I am entitled to redress for the time I spent in jail."

That although actual words were changed to read different in Reporter's Transcript, page 136, the remark which follows by Judge Gates as the court [line 5] in repeating the first eleven words of appellant's statement, established conclusive evidence of the falsification of the record, but the words as they appear in said transcript still confer jurisdiction in this Court under Title 28, U. S. Code, Section 1257(3), which includes all of the provisions under the Constitution, the statutes, and authority exercised under, the United States for the enforcement of appellant's rights, privileges or immunities and redress for wrong, with the same force and effect as if herein set forth and repeated at length; which also set forth on topical index page of appellant's petition to the

Supreme Court of the State of California and on page V thereof to be used and added to appellant's brief and plea herein.

That Kermit J. Morgan refused to move for a new trial under Section 502 or appeal from the unlawful verdict (App. Op. Br. pp. 19 and 20); therefore, appellant filed petition No. 6900 in said District Court for the writ of certiorari, which was denied without a hearing about three days before the date set for sentence; appellant immediately filed a petition for rehearing; that in the petition appellant drew in question and assailed the validity of Sections 501 and 502, Vehicle Code, upon the ground that both are unconstitutional, meaning a law or statute "contrary" to the Constitution; that contrary is the definition of the word "repugnant." Since neither section properly defines the crime, appellant in his opening brief (p. 29, lines 12 to 27) and in his reply brief (p. 12, lines 7 to 17) again drew in the question of validity to the effect of its being repugnant to the Constitution or laws of the United States.

In the use of the word to "DRIVE" is a very cogent reason why this Court will acquire jurisdiction (see 63 S. Ct. 76 and App. Op. Br. p. 26, lines 11 to 15); to OPERATE is definitely not to drive and is not included in the definition of the word "drive." There is no official report involving both Sections 501 and 502 Vehicle Code, showing where any person after having been charged with violation of either one had been convicted of the other. Likewise the state courts of appeal have failed to give a practical interpretation of the ambiguity or uncertainty and validity of said statutes, and the appellee has failed to cite cases showing that any such interpretation

has been acted on for a number of years after their enactment.

But by re-citing Amendments IV, V, VI, VII, VIII, XIV and Article VI, Section 2, of the Constitution of the United States in appellee's statement opposing jurisdiction, multiplied by nine contained in Section 1257, U. S. C., Title 28, equals sixty-three jurisdictional authorities.

In the Reporter's Transcript on Appeal the driver, Sam Cason, upon direct examination, the prosecution failed to place the cause against defendant [pp. 6 and 19, lines 1 to 11]. Sam Cason testified to the effect that he did not see defendant's car until after he had hit it, he was talking [evidently to the passenger in the back seat because the front seat passenger, Ransberry, testified at the preliminary that he was passed out asleep, and to the same effect on p. 20, lines 9 and 10, Rep. Tr. herein]; and when Sam Cason turned around he had hit, it was too late to put on brakes, he didn't see it in time; also on page 12, testified that defendant wouldn't talk, but Morgan [lines 11 and 12] had it stricken and [p. 9, lines 22, 23], as through the entire proceedings, Mr. Morgan propounded his questions so as to unlawfully convict defendant of Section 502, Vehicle Code.

In Reporter's Transcript, pages 88 and 89, Mr. Morgan recalled Barker to repeat testimony which appears to be given during the preliminary in answer to a suggestive question put to him by the COURT for the prosecution; Morgan did all in his power to make it appear that a sobriety test had been given to the defendant, when in fact no such test had been given anywhere except at the Receiving Hospital defendant was asked to pick up a coin and no other test was taken aanywhere; and defendant did not talk nor blow his breath excepting at the hospital

from across the room accusing Officer Barker of trying to frame up a false charge. (See App. Op. Br. p. 16, lines 8 to 21, only a portion of which appears in Rep. Tr. p. 126, lines 21 to 27.)

In the opinion of the lower court on page 2, lines 24, 25, 26, testimony of witnesses has been changed so as to make it appear that Cason and another witness who testified that in their opinion defendant was intoxicated; also made it appear that the false statement made by Officer Barker [Rep. Tr. p. 46, lines 11 to 14] was made by the defendant, but in the entire testimony of defendant as transcribed there is no mention made of milk, and the only thing defendant said or admitted drinking was apple juice in which fermentation had been prevented and [see Rep. Tr. p. 133, lines 23 to 27] was found guilty upon his own testimony as shown by the verdict therein [p. 2, line 22].

In Appellant's Opening Brief, last page, affidavit of Charles Estes, first to arrive upon the scene after the collision, proves that Rochon was two blocks away [Rep. Tr. p. 120 to line 4], included (transcribed different) defendant said there was a car with two headlights on at Adams, about two blocks away and [p. 122, line 16] somebody gave him a wet handkerchief, not Rochon. That no person, including Barker's fellow officer, supported Barker's false statement saying that the defendant said he had some beer before supper; that defendant always uses the word dinner is supported by affidavits of Joseph G. Gogsman, son, Emma Healey and Jett Gossman, which proves it to be false.

Statement of Dr. Silver and testimony of Dr. Holt, together with exhibits presented [Rep. Tr. pp. 125 and 126], A, B, C and D, show that defendant was thrown

head first through the right rear door window, shattering all of the shatterproof glass, and was rendered unconscious for a short time; Exhibits E and F show Sam Cason's car with all the damage in front. When Charles Estes and Officer Barker first saw defendant he was on the outer edge of the right front seat, the door was open and his legs were dangling out [Rep. Tr. p. 92, lines 1 to 16; p. 43, lines 21 to 27]; he did not talk. And on page 59, lines 21 to 27, Officer Barker testified that "if there was a visible injury, a bump on the head, or complaints, he, Barker, would have reason to doubt whether defendant would be under the influence" [p. 60 to line 17]. Morgan having been told a dozen times before trial that no such test was given nor taken and having been unable to make it appear properly by coaching, the test was made to appear to have been started at the scene and finished at Central Station, which it not true; but in the condition of having been rendered unconscious, appellant did very good by picking up a coin and touching his nose in the Receiving Hospital.

Again, on page 60, Morgan started to put the question properly, then withdrew the word defendant and substituted the word person (b) so as to make it appear that a test was given; used the words "that evening to him" saying: "Assume a person does have a concussion in an accident. Do you think that he would be able to walk the line that you pointed out that evening (it was morning) to him, by staying on the line?" Which was objected to as not proper cross-examination. "The Court: Sustained because it calls for an opinion" (subterfuge), which if answered truthfully and properly would have given defendant some protection, and showing in view of the District Court's affirmance that the courts in Los

Angeles will convict a defendant upon any other person's opinion, but will not allow an opinion that may be in his favor for his protection.

Remarks not shown to have been made by defendant held inadmissible as evidence. (*State v. Jones*, 305 Mo. 437, 268 S. W. 83; cited in App. Op. Br. p. 4, lines 23 to 27.) The arresting officers and Sam Cason, who was coached, were the only persons that testified that they smelled liquor when they smelled their own breath. Seven witnesses testified to the effect that they did NOT smell liquor on defendant's breath and no witness saw defendant take a drink of any kind; also if it were proven that defendant stated he had two bottles before Officer Barker's supper time, it still would not prove that he drank them. In the opinion of appellant, Officer R. H. Barker was intoxicated when he arrived at the scene of the accident, and it is a matter of common knowledge that when a person has been drinking alcoholic liquor he cannot ascertain and form a reasonable opinion whether or not any other has had a drink by smell. Denying that any person smelled appellant's breath during that time after the collision.

In the preliminary transcript it appears Barker testified, saying [p. 33] in effect "that he had had several bottles of beer" [p. 39], "he had had one bottle of beer"; but at the trial Barker testified to the effect that defendant had two bottles of beer before supper. Then Morgan began advising, urging defendant and his wife to testify that they did have two bottles of beer before supper; the wife appeared to agree, saying, "OK., but I know it's a lie, and my husband never uses the word supper, we always say DINNER." Morgan insisted, saying, "That makes no difference, it won't hurt to admit that you had two bottles of beer, because that was about eight hours

before the accident"; which is supported by four different affidavits of four persons on pages 43 to 56 in appellant's opening brief, and as a part thereof.

At the trial [Rep. Tr. p. 46, lines 11 to 14] it appears that Barker stated, "and the other car struck him on the side, and he also stated he had two beers before supper, and after supper he had no beer but had about three-fourths of a quart of milk." At the preliminary [Rep. Pre. Tr. p. 33, lines 24, 25 and 26] Barker testified:

> "The only statement he gave me that he had had several bottles of beer before supper, and that he was then going to the store to get a bottle for his wife." (Substituting the last clause for no beer but three-fourths of a quart of milk.)

With reference to the said District Court's opinion (p. 2, last four lines, to next page) in using the word "had" twice and the words "he was on his way to get a bottle (of liquor) for his wife," it is evident that the lines were taken from Reporter's Preliminary Transcript, page 33, mentioned above, but changing bottles to two beers, adding milk and liquor. That in Reporter's Preliminary Transcript, page 39, line 24, Barker said defendant was going to get a bottle of beer for his wife, and he was not heard to say the same at the trial nor mention the word milk, and it is shown in the record that the defendant never mentioned the word "milk" at any time during the trial or otherwise and at all times denied that he had anything intoxicating to drink, but admitted that the only thing he drank was apple juice in which fermentation had been prevented. [Rep. Tr. p. 131 lines 13 to 21, and pp. 133 and 134.]

> "The Court: Well, I have listened to the evidence. I think the apple juice was somewhat hard. From

what people have told me, the worst jag you can get is on hard cider.

"As far as violation of Section 501, I am satisfied that wasn't the approximate cause of the accident; but the court is satisfied and the court does find him guilty of violation of Section 502, a lesser and necessarily included offense." (A "JAG" is a small load or only partly intoxicated and cannot be worst; a "JAG" consists of the first stage of intoxication wherein the wits, intellect and faculties are brought to a higher degree.)

Judge Walter S. Gates actually announced:

"The Court: It is plain from the evidence that the defendant was not the proximate cause of the accident and is not guilty of violating 501, but I think the apple juice was applejack and the worst JAG you can get is on applejack, and I FIND he is guilty of the violation of section 502, Vehicle Code."

It is true that applejack will produce a WORSE "JAG-ON" in some people than in others, and in falsifying this part of the record they should have left the word "worst" out, when applejack was changed into hard cider, because in sharpening the intelligence, hard cider produces the BEST jag-on in most people. (Applejack is apple-brandy.)

It is plain to see in the record that the judgment of conviction was based upon the verdict and findings of Judge Gates who seemed to think that defendant's apple juice was hard cider and could be changed into applejack without distillation. The defendant pointed this out to

Kermit when he refused to make a motion for a new trial by jury before a different judge, and accounts for said change in the record and after discussing the important part of Sam Cason's testimony at the preliminary, it also was not included in the Preliminary Transcript where he testified to the effect that he did NOT smell defendant's breath, that the defendant didn't walk, talk, nor blow his breath, but took only one step. Said portion of Cason's testimony is shown in four affidavits in appellant's opening brief.

Page 2, lines 22 and 23 in the opinion the other witness in whose opinion the lower court based its opinion, was Maurice Rochon who testified [Rep. Tr. p. 35] that he saw officers try to give defendant a test. "He didn't make ANY steps forward, he refused to breathe into other guy's face, and no, I didn't get close enough to him to smell his breath." Yet the defendant was intoxicated in the opinion of Rochon who proved by his own statement that he did not see and know enough to form any reasonable opinion; but his testimony proves that not even a partial test was given by the arresting officers nor taken by the defendant at the scene of the accident.

The opinion seems to have been formed from the obviously false testimony of R. H. Barker and statement purported to have been given or made by the defendant, starting with several bottles of beer, reduced to one bottle, then changed to two bottles and finally reduced to an assumption of two glasses of beer that he had had before Barker's supper or during the afternoon or evening of

the day before the time of the accident. It is a known fact of common knowledge that the effects of a few drinks taken before a meal pass away when and immediately after eating a meal.

> "Evidence that the driver was intoxicated several hours before the accident, was properly excluded where it was too remote in point of time and there was no casual connection offered to be shown between the accident and such intoxication."
>
> *People v. Trantham* (1937), 24 Cal. App. 2d 177, 74 P. 2d 787.

It is against the existence of good government as well as against the inherent principles of justice and good morals, for any combination of persons to convict another person of being intoxicated or under the influence of intoxicating liquor more than eight (8) hours after having had two glasses of beer and it is much more "WORST" to confirm a judgment of conviction for drinking apple juice by making it appear that the apple juice was beer, after telling me themselves, "We can't retry the case up here," but in basing their opinion upon the testimony of a statement purported to have been made by the defendant it appears that your appellant was again used as a witness against himself through another witness, which certainly is not due process of law, and there can be NO reasonable and probable cause for any two or more persons to form an opinion under said circumstances that your appellant was guilty as not charged.

Invalidity of Statutes.

THE VEHICLE CODE.

1. Short Title. This act shall be known as the "Vehicle Code," and Section 502 declares "any highway" to be within the jurisdiction of the "Vehicle Code" which designates no boundaries, but places jurisdiction under federal authority of the United States.

Sections 501 and 502 Vehicle Code, are more fully set forth in the appendix to appellee's statement opposing jurisdiction, including motion to dismiss appeal. The pertinent provisions under Section 501, Vehicle Code:

> "Any person who, while under the influence of intoxicating liquor, drives a vehicle and when so driving does any act forbidden by law or neglects any duty imposed by law in the driving of such vehicle, which act or neglect proximately causes bodily injury to any person other than himself is guilty of a felony," etc.

Then prescribes the penalty but does not first include the words contained.

Under Section 502, Vehicle Code:

> "(a) It is unlawful for any person who is under the influence of intoxicating liquor to drive a vehicle upon any highway."

Prescribes penalty but does not include revocation of operator's license as part of the penalty.

> "(b) *It is the duty of the judge or justice to require the surrender to him of any operator's or chauffeur's license and forward the same to the department with the abstract of conviction.*"

Neither statute defines what constitutes or what it consists of to be "under the influence of intoxicating liquor" and in the absence of a statute defining said phrase there can be no "due process of law" that said sections are otherwise contrary to law, because of being repugnant to the Constitution or laws of the United States, and the decision of the state court is in favor of the validity thereof.

Section 367d, Penal Code:

> "Any person operating or driving an automobile, motorcycle or other motor vehicle who becomes or is intoxicated while so engaged, in operating or driving such automobile, motorcycle or other motor vehicle shall be guilty of a misdemeanor." (Referring to the court's opinion, p. 4, lines 14 to 19.)

It is plain to see that this section relates more so to dope addicts or becoming intoxicated from drugs or liquor, and does not relate to driving on private property any more than Section 501, Vehicle Code, which also omits the words "upon any highway" as in 502. (U. S., Okla.) The doctrine of legislative acquiescence in judicial construction of statutes is at best only an auxiliary tool for use in interpreting ambiguous statutory provisions. (*Jones v. Liberty Glass Co.*, 68 S. Ct. 229, 332 U. S. 524.)

Constitutional construction and interpretation. Title 1, U. S. C. (A) VI:

> "Words in a statute are always to be given the meaning they have in common use unless there are other reasons to the contrary. They are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged."

"Under the influence of intoxicating liquor" is a phrase enlarging the word intoxicated into six words, the vagueness of which renders said statutes invalid from uncertainty in regard to persons within the scope of the statute or in regard to the applicable test to ascertain guilt. (App. Rep. Br. p. 12; App. Op. Br. p. 32.)

> "Men of common intelligence cannot be required to guess at the meaning of penal enactment."
>
> *Id.*, 6 S. Ct. 649, 11 S. Ct. 912.

> "A penal enactment must completely declare and define the crime. It is not competent to delegate to any department (or any person) the power to declare what facts shall constitute an offense."
>
> U. S. C. (A), Art. I, Sec. 1.

"There is no general agreement in the laws or decisions of the various states of the United States as to what constitutes an 'intoxicating liquor,'" and the Vehicle Code under DIVISION 1, WORDS AND PHRASES DEFINED, fails to define any part of the phrase used in "under the influence of intoxicating liquor." (Sec. 1575, Civil Code of the State of California.)

Influence can only be a real or apparent authority that one person holds over another (also defined in Webster's Dictionary as "to influence a person for good; to be influential"), but under Section 1575, Civil Code of California, when such authority or confidence is reposed in an attorney and used for the purpose of obtaining an unfair advantage, it then becomes "undue influence."

Therefore, by virtue of its own enactment "influence" consists of and can only be "an authority held by one

individual over another," and very definitely not "intoxicating liquor."

As an example from a logical standpoint, if an alcoholic trying to reform has not had a drink for several days or more he would naturally be longing and craving to have a drink of intoxicating liquor, and with such desire dominating his mind, he would certainly without doubt be "under the influence of intoxicating liquor," and if the crave urged him to drive his vehicle to the store to buy a bottle of liquor for himself he would be guilty of violation of Section 502, Vehicle Code; but in the instant case it appears in the record that his wife was under such influence while the defendant was driving to the store to get a bottle for her, and as set forth in the opinion of the lower court, page 2, line 26, consists of one of the erroneous reasons that the judgment was affirmed therein.

That Sections 501 and 502, Vehicle Code, as construed by the said state court of appeal offered no standard of conduct that it is possible to know and there are cases wherein such sections of the laws were declared invalid by this Court under the Fourteenth Amendment (234 U. S. 216).

U. S. R. S. 1035 prescribes, in short, that to be found guilty of any offense it must be necessarily included in that with which he is charged; and very definitely does not mean any other offense and can only be a lesser degree of the same offense as charged; which in the instant case was a felony and defendant was not found guilty, but was instead convicted of violation of a misdemeanor not included as another count in the charge; the judgment in being affirmed by the state court of appeal is a decision

against the validity of the above mentioned statute and/or other statutes of the United States.

Points and authorities are set forth in Appellant's Opening Brief, pages 26 and 27 to line 10 and page 31 to line 16. It is plain to see that the only words contained in Section 501 which are also contained in 502 Vehicle Code consist of the phrase "under the influence of intoxicating liquor," and that 501 Vehicle Code does not declare it to be unlawful to drive upon a highway under said condition.

> "At common law, however, there could be no conviction of a misdemeanor upon an indictment for a felony, although the element of the misdemeanor were included in the felony charged."
>
> *U. S. v. Larned,* 26 Fed. Cas. No. 15,566 (4 Cranch. C. C. 335.)

Points, authorities and facts set forth in Appellant's Opening Brief, pages 2, 3 and 4, and affidavits on pages 34 to 57, show that the defendant was committed without probable cause (Amend. IV) and without due process of law, likewise unlawfully convicted upon unsubstantial or insufficient evidence as shown in the foregoing pages of this brief, and although having been changed some, the Reporter's Transcripts show that the evidence was not substantial and insufficient, particularly such evidence as having had two beers and no more since eight hours before the time the accident occurred.

That the records, including appellant's briefs, pages 20 to 39, Appellant's Opening Brief, and pages 13 and 14, Appellant's Reply Brief, show that the appellant was subjected to the deprivation of rights, privileges and/or immunities specially set up under the Constitution and claimed thereunder in appellant's briefs filed in said state

court and herein. It is also shown that appellant was deprived of civil rights, placed twice in jeopardy in a conspiracy, by the officers involved, to prevent the due administration of the law or government and was denied the right to bail. [App. Op. Br. p. 21; Rep. Br. p. 8; Clk. Tr. pp. 11 to 17; Rep. Tr. pp. 135, 136; Clk. Tr. pp. 11-17.]

Said records show that appellant was denied the right to bail for a period of seventy-six (76) days and subjected to cruel and unusual punishment in a conspiracy to make it appear that he was mentally ill and of unsound mind so as to prevent appellant from having and exercising the rights of a citizen and particularly to prevent appellant from prosecuting an appeal or acting as his own counsel or attempting to secure redress. That such traitors who function the court as a racket of extortion under the color of authority and not being satisfied by depriving a person of all the material things in life will also deprive him of his mind. (App. Rep. Br. p. 14; App. Op. Br. pp. 21 to 25.)

That with special privileges including the right to practice law, the majority of attorneys and officers of the courts of the State of California are associated having force of the laws in their hands and using such power so as to prevent the due administration of government or oppose the authority thereof, or prevent, hinder or delay the proper execution of the law, in violation of U. S. R. S. 1977, 1979, 1980, 5406, 5407, 5336, 5399, 5508, 5510, 1991, etc.; U. S. Const., Art. VI, Sec. 2. (See App. Op. Br. pp. 20 to 25; Rep. Br. p. 14.)

As shown by the record, Judge Gates' insane proceedings were ordered under Section 1871, Civil Code of Cali-

fornia, and not Section 1368, Penal Code. Appellant was not allowed to speak to the jury, it was otherwise arranged to have him put out of the way quick, but appellant had it orally stipulated with the judge that the statutes must be strictly construed and shall be the rule of decision, and when asked by appellant each witness testified that they had never seen defendant commit any act so as to endanger health, person, or property, and was found not to be mentally ill. To be filed herein appellant is sending a certified copy of the complaint and/or petition in both psychopathic actions, No. 53044 filed March, 1938, and 104328 filed March, 1949, and there should be a photostatic copy of a patent application dated January 12, 1932, entitled ART AND METHOD OF PROPULSION in Reply Brief, proving double jeopardy, and showing that the allegations in each copy are for the same pretended reason and did not show probable cause for the issuance of warrants of apprehension, but appellant was inflicted with the consequences of ATTAINDER and/or deprivation of rights, for having actually filed an application for a patent on a method of jet propulsion and for trying to give it to our Government. In action 53044 appellant was imprisoned sixteen months and was not released until the hospital superintendent was satisfied that appellant would not sue anybody, while as a matter of fact all actions mentioned on page 4, Appellant's Reply Brief, were filed against appellant, and after having been denied all rights as well as executive action by the officers of the state, appellant filed action No. 6997-C in the U. S. District Court and immediately after filing another action therein in March, 1938, appellant was railroaded into the nut house without being given an opportunity of any kind to defend himself. Said No. 6997-C was filed against the State, County, City, Walter S. Gates, and others.

Said case is entitled *Gossmann v. J. Lamar Butler et al.*, No. 6997-C, U. S. District Court. Superior Court action, *McClanahan v. Gossman*, No. 310686, was finally dismissed by the Chairman of the Judicial Council, State of California, and appellant hereby requests and prays for this Court's order removing the entire file thereof into this Court for final adjudication that M. McClanahan or Harry Mead McClanahan was convicted of a felony, given a suspended sentence and bound over to the Grand Jury of Chillicothe, Ohio, and was under such jurisdiction at the time when action 310686 was filed, and when Judge Walter S. Gates appointed J. Lamar Butler as receiver without due process of law and against the existence of government by taking, withholding and destroying appellant's means of livelihood which he alone had established for the benefit of his family and their home seven years before 1930 and before it appeared to be a partnership in the opinion of Judge Gates who created a partnership between a paroled felon and a minor child, because the Welding Service Co. was and remains registered in the name of Joseph G. Gossman who, upon reaching his majority, joined the Army and is now a member of the Armed Forces of the United States. Your appellant's true name is Joe Gossman, but his real name should be George Gossmann by virtue of his birth certificate from Blue Island, Illinois.

Without appellant's knowledge his certificate of recovery was recorded in December, 1943, while Section 6739, Institutions and Welfare Code, was in effect and which in part read as follows:

> "Notwithstanding the provisions of sections 6729, 6734 and 6735 (b), the certificate of recovery issued to any person by the medical superintendent of a

state hospital, no county clerk of any county shall be required under the provisions of this article to record any of said documents; as to the recordation of any such document, and to the record thereof, shall be null and of no effect."

Appellant's certificate was issued under the provisions of Section 6734, Institutions and Welfare Code, which prescribes "That the medical superintendent SHALL issue to the PERSON his certificate that such person is recovered and restored to reason," but the custom used is to file a copy with the county clerk, and the Department of Mental Hygient keeps the original, and the so-called patient is not advised; such said certificate has never been issued to appellant and during court proceedings in action No. 104328 appellant's wife filed a copy of a certified copy in court.

"Of a void act or deed every stranger may take advantage."

Tudor v. Tudor, 67 Atl. 539, 80 Va. 220, 130 Am. St. Rep. 977.

With the psychopathic complaints appellant is sending a certified copy of the verdict of the jury and hereby requests and prays this Court order judgment and decree declaring George Gossmann to be sane and/or an order commanding the Superior Court of the State of California, in and for the County of Los Angeles, and Judge George Francis to issue an order, judgment and decree declaring and certifying that George Joe Gossman is sane, recovered and restored to reason. (See also, *Sunol v. Hepburn*, 1 Cal. 254, 281.)

Referring again to page 5 in its opinion the District Court of Appeal of the State of California (logically) admits and agrees that the three statutes mentioned are invalid, ambiguous and arbitrary by finally concluding "that it would have been LOGICAL for the Legislature to make driving while intoxicated a single offense, punishable as a misdemeanor in the circumstances specified in sections 502 and 367d, and as a felony under the conditions stated in section 501." (Drunk or intoxicated is more LOGICAL. *People v. Joe Gossman*, 95 A. C. A. 342, 212 P. 2d 585.)

Conclusions.

Like the said state court in its conclusion to the effect that three state statutes involved are all invalid, unreasonable, or decidedly not logical in any sense, the appellee has in effect set forth SIXTY-THREE separate and distinct authorities which confer jurisdiction on this Court, under the provisions of Title 28, Section 1257, U. S. C., and appellant has shown construction of many acts in the proceedings taken against him consisting of conspiracy which are repugnant to the existence of good government and the Constitution of the United States. (App. Op. Br. pp. 20 and 35; App. Aff. p. 2.)

That appellant's claims have been substantially set forth on his appeal to this Honorable Court, and appellee has failed to set forth any substantial, Federal, Constitutional authority in his motion for dismissal, so therefore appellant moves this Honorable Court for its order denying the motion of appellee.

That as a result of the unlawful procedure appellant has been under a doctor's care and unemployed from

January 18, 1949, to the present time; that prior thereto he had been steadily employed in the same place for a period of eight years or longer and was earning $1.90 per hour straight time and $2.75 per hour for all time over eight hours each day and is entitled to the sum of $4,560.00 spent imprisoned and unlawfully restrained of his liberty and $76.00 per week since April 4, 1949, to the 16th day of May, 1950, equals $4,408.00, making a total of $8,968.00 (eight thousand nine hundred and sixty-eight dollars) and is the sum of earnings and wages that your appellant has been deprived of by reason of the Overt acts influenced by officers of the State of California.

(See App. Op. Br. pp. 34 to 39; Rep. Br. pp. 13, 14.)

In appellant's affidavit therein it is shown that the acts of Walter S. Gates have relation back to his receivership action No. 310686, October, 1930, in Superior Court and consist of a continuance in a conspiracy to prevent appellant from having and exercising the rights of a citizen of the United States and appellant believes that when Judge Gates learned that he is the same person who caused the exposure of the receivership racket, and thereafter filed an action No. 6997-C in the U. S. District Court, said Judge Gates conspired with others and did have your appellant again committed to a state hospital as shown by the record in the files of cases Nos. 53044 and 104328. That based on the average yearly net income for seven years prior to the deprivation thereof appellant's Welding Service business was worth $100,000.00 at least, because the net income during said period was never less than

$5,000.00 yearly and in this instant case the loss is $8,968.00.

Therefore, appellant prays judgment against the State of California and all such officers thereof who may be held responsible in the sum of eight thousand nine hundred and sixty-eight dollars, and against Kermit J. Morgan, William E. Simpson, Walter S. Gates, the Los Angeles Police Department, the Superior Court of the State of California, in and for the County of Los Angeles, in the sum of $8,968.00;

And for loss resulting from Superior Court action No. 310686, prays judgment in the sum of two hundred and fifty thousand dollars against the State of California, Walter S. Gates, LeRoy Dawson, C. L. Welch, J. Lamar Butler, Proctor K. Perkins, Don Lake, Romain Hogan, Robert W. Kenny, Douglas L. Edmonds, Lester Wm. Roth, J. T. B. Warne;

And prays for all costs and such other relief as prescribed in the laws of the land.

Respectfully submitted,

JOE GOSSMAN,

In Personam.

Affidavit.

State of California, County of Los Angeles—ss.

Joe Gossman, being first duly sworn, deposes and says: That he is the appellant and petitioner herein and on appeal from the District Court of Appeal of the State of California, in and for the Second Appellate District (case No. Crim. 4380).

Affiant has read the above and foregoing brief and petition for the writ of certiorari and knows the contents thereof, and the same is true of his own knowledge, information or belief, so help me God.

JOE GOSSMAN.

Subscribed and sworn to before me this 18th day of May, 1950.

MARGUERITE F. CRIPPS,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires January 3, 1952.

FILED
JUN 22 1950
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 142

JOE GOSSMAN,

Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Appellee

APPEAL FROM THE DISTRICT COURT OF APPEAL, SECOND APPELLATE DISTRICT, OF THE STATE OF CALIFORNIA

APPELLEE'S STATEMENT OPPOSING JURISDICTION, INCLUDING MOTION TO DISMISS APPEAL

FRED N. HOWSER,
Attorney General of the State of California,
FRANK W. RICHARDS,
Deputy Attorney General,
600 State Building, Los Angeles 12, California,
Attorneys for Appellee.

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SUPREME COURT OF THE UNITED STATES

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APPEAL FROM THE DISTRICT COURT OF APPEAL, SECOND APPELLATE DISTRICT, OF THE STATE OF CALIFORNIA

APPELLEE'S STATEMENT OPPOSING JURISDICTION, INCLUDING MOTION TO DISMISS APPEAL

The People of the State of California, Appellee, respectfully presents the following matters making against the jurisdiction of this Honorable Court asserted by appellant:

Statement of Case

An information was filed in the Superior Court of the State of California, in and for the County of Los Angeles, charging appellant with violation of section 501 of the Vehicle Code of California in that on or about the 15th day

of August, 1948 at and in the County of Los Angeles, State of California, he did wilfully, unlawfully and feloniously drive an automobile while under the influence of intoxicating liquor, and in an unlawful manner, proximately causing bodily injury to Sam Cason, Joseph Taylor, Melvin Capers and Alton Ronsberry. (Cl. Tr. p. 1.) At the time of his arraignment he was represented by counsel, pleaded not guilty and his trial was set over to a later date. (Cl. Tr. p. 3.) At the time of trial appellant, his counsel and the District Attorney waived trial by jury. (Art. 1, sec. 7, Calif. Constitution.) Evidence was submitted to the court by the respective parties, following which the court found Joe Gossman, defendant, guilty of violation of section 502 of the Vehicle Code and he was granted leave to file an application for probation. (Cl. Tr. pp. 7, 8.) At the time of hearing said application the court appointed Doctor Marcus Crahan, under section 1871 of the Code of Civil Procedure, to make a mental and physical examination of defendant and report his findings to the court. The hearing on said application was continued to a later date. Defendant was remanded to custody and his bond exonerated. (Cl. Tr. p. 11.) Civil insanity proceedings were ordered filed. (Cl. Tr. p. 12.) A psychopathic hearing was had. The result thereof is not set forth in the record. (Cl. Tr. p. 15.) Defendant later withdrew his application for probation and was sentenced to thirty (30) days in the county jail. His counsel was excused and defendant in propria persona gave notice of appeal and his bond on appeal was set at $1000. (Cl. Tr. pp. 16-19.) The record on appeal was filed with the District Court of Appeal of the State of California, Second Appellate District, following which appellant filed a brief in propria persona. The appellate court court affirmed the judgment (*People* v. *Gossman*, 95 A.C.A. 342, 212 Pac. 2d 585), and the Supreme Court of California

denied a hearing. (212 Pac. 2d 585.) A copy of the opinion of the District Court of Appeal is set forth in the appendix hereto, which contains a statement of the facts.

Appellant in his opening brief filed with the said District Court of Appeal raised the following points:

1. That his trial was unnecessarily delayed;

2. That the offense defined in section 502 is not included in the offense defined in section 501 of the Vehicle Code:

3. That for no good reason and without probable cause he was arrested and unlawfully restrained of his liberty;

4. That he was ordered to take the witness stand and required to contribute evidence against himself;

5. That his counsel in addition to his wilful neglect or violation of duty misbehaved by pretending to represent him when he acted more as a prosecuting attorney, withheld and suppressed evidence and did not make any argument for him;

6. That he was remanded into custody after his conviction and denied bail and the court appointed Doctor Marcus Crahan to make a mental and physical examination of him;

7. That he discharged his attorney who falsely continued to represent him, in violation of the IV, V, VI, VIII and XIV Amendments of the Constitution of the United States;

8. That at the hearing on the question of insanity his relatives and family were not allowed to testify but succeeded in securing a jury trial later;

9. That the evidence is insufficient because it does not prove him guilty beyond a reasonable doubt and the witnesses were coached;

10. That California has no statute defining what constitutes being under the influence of intoxicating liquor nor a statute authorizing the giving of a sobriety test by police officers;

11. That his counsel, judge and divers other persons conspired for the purpose of impeding, hindering, obstructing, or defeating the due course of justice with intent to deny him equal protection of the laws;

12. That he was committed without reasonable or probable cause and the information must be set aside under section 995 of the Penal Code and Article 1, section 19, of the California Constitution;

13. That he was used as a witness against himself and therefore denied due process of law, Article 1, sections 12 and 19, California Constitution and the IV and V Amendments of the Constitution of the United States;

14. That he was subjected to the deprivation of rights, privileges and immunities and therefore entitled to redress in the sum of $4500 under Article IX, section 2, and the IV, V, VI, VII, VIII and XIV Amendments of the Constitution of the United States;

15. That during the fifty-second session of the Legislature Assembly Bill 190 was enacted containing a provision which immunized him from all legal action and procedure against him, likewise rendered him incapable of committing any crime, and he could have taken revenge and committed an unlawful act in revenge for the unlawful deprivation of his livelihood, if he were so inclined, but lawful and just compensation is to him more proper.

Federal Questions

The only Federal questions presented by appellant to the said District Court of Appeal are set forth in subdivisions 7, 11, 13 and 14 above, none of which is supported by the record. As to his Jurisdictional Statement it is impossible for appellee to single out any definite Fed-

eral question. In his Petition for Appeal appellee can more readily understand his points, namely:

(1) "That sections 501 and 502 Vehicle Code of Calif. fail to completely declare and define the crime, and therefore are repugnant to the Constitution or laws of the United States.", and (2) "That for a period of 76 days appellant was denied the right to bail, also was subjected to the deprivation of rights, privile*d*ges or immunities specially set up under the Constitution or Statutes of the United States; Said State Courts were apprized that the validity of a Statute was being assailed, but refused to adjudicate and otherwise decided in its favor;"

Points

I

Validity of Sections 501 and 502 of the Vehicle Code

Said sections of the Vehicle Code are set forth in the appendix hereto. The reason asserted by appellant why section 501 of the Vehicle Code is unconstitutional is that it does not state "It is unlawful for any person who is under the influence of intoxicating liquor to drive a vehicle upon any highway." It is to be noted that appellant, though charged with violation of section 501, was convicted under section 502, a lesser and included offense. The opinion of the District Court of Appeal states:

> "The difficulties which the courts often encounter do not arise out of doubts as to the general rules, but in analyzing the elements of similarity and dissimilarity of related offenses, in order to determine whether one is necessarily included in the other. We have no such difficulty in the present case. In addition to sections 501 and 502 of the Vehicle Code we have section

367d of the Penal Code, by which it is made a misdemeanor to become or be intoxicated while driving a motor vehicle. The Penal Code section, as limited by the Vehicle Code, relates to driving on private property (People v. Lewis, 4 Cal. App. 2d Supp. 775 (37 P. 2d 752)); section 502 to driving on a highway; and section 501 to driving either on private property or a highway in an unlawful manner, and so as to proximately cause bodily injury to any person other than the driver. While the offenses defined by sections 367d and 502 vary as to circumstances, and section 501 encompasses additional circumstances and consequences, all three offenses have a common root in drunk driving."

We submit that the above construction and interpretation placed upon the various code sections dealing with drunk driving violates no provision of the Federal Constitution.

II

Bail

Appellant asserts that he was denied the right to bail. The record, as hereinabove set forth, does not support appellant's contention unless he is referring to the time when he was remanded to custody following his conviction but before judgment was rendered and civil proceedings were ordered filed by the court relative to his insanity. This procedure is authorized by section 1368 of the Penal Code of California; a copy of said section is set forth in the appendix hereto. We submit that this procedure violates no provision of the Federal Constitution. Section 1367 of the Penal Code provides: "A person cannot be tried, adjudged to punishment, or punished for a public offense, while he is insane."

Conclusion

Appellee believes that it has set forth the claims of appellant on his appeal to this Honorable Court. No substantial Federal question is presented by this appeal and therefore appellee moves this Honorable Court for a dismissal thereof.

Respectfully submitted,

FRED N. HOWSER,
Attorney General of the State of California,
FRANK W. RICHARDS,
Deputy Attorney General,
Attorneys for Appellee.

APPENDIX

VEHICLE CODE SECTION 501

"Any person who, while under the influence of intoxicating liquor, drives a vehicle and when so driving does any act forbidden by law or neglects any duty imposed by law in the driving of such vehicle, which act or neglect proximately causes bodily injury to any person other than himself is guilty of a felony and upon conviction thereof shall be punished by imprisonment in the state prison for not less than one year nor more than five years or in the county jail for not less than 90 days nor more than one year or by fine of not less than two hundred dollars ($200) nor more than five thousand dollars ($5,000) or by both such fine and imprisonment."

VEHICLE CODE SECTION 502

"(a) It is unlawful for any person who is under the influence of intoxicating liquor to drive a vehicle upon any highway. Any person convicted under this section shall be punished upon a first conviction by imprisonment in the county jail for not less than thirty days nor more than six months or by fine of not less than fifty dollars ($50) nor more than five hundred dollars ($500) or by both such fine and imprisonment and upon a second or any subsequent conviction by imprisonment in the county jail for not less than ninety days nor more than one year or by a fine of not less than two hundred dollars ($200) nor more than one thousand dollars ($1,000) or by both such fine and imprisonment.

(b) Whenever any person is convicted of a violation of this section it is the duty of the judge or justice, *unless, under the provisions of Section 307, the court recommends that there be no license suspension,* to require the surrender to him of any operator's or chauffeur's license of such person and to forward the same to the department with the abstract of conviction

as provided in Section 744 hereof, and the department shall suspend the driving privilege of any person so convicted as provided in Section 307."

PENAL CODE SECTION 1368

"If at any time during the pendency of an action and prior to judgment a doubt arises as to the sanity of the defendant, the court must order the question as to his sanity to be determined by a trial by the court without a jury, or with a jury, if a trial by jury is demanded; and, from the time of such order, all proceedings in the criminal prosecution shall be suspended until the question of the sanity of the defendant has been determined, and the trial jury in the criminal prosecution may be discharged, or retained, according to the discretion of the court until the determination of the issue of insanity."

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE

Crim. No. 4380

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff and* RESPONDENT,

v.

JOE GOSSMANN, *Defendant and Appellant*

Appellant Joe Gossman was accused of violation of section 501, Vehicle Code, in a trial to the court was found guilty of violation of section 502 of the Code and, after refusing to accept the court's offer of probation was sentenced to thirty days in the county jail.

In brief, section 501 makes it an offense for any person under the influence of intoxicating liquor to drive a vehicle, and when so driving do any act forbidden by law or neglect any duty imposed by law in the driving of a vehicle, which

act or neglect causes bodily injury to any person other than himself. The offense is made a felony. By section 502 it is made unlawful for any person who is under the influence of intoxicating liquor to drive a vehicle upon any highway. This offense is punishable by imprisonment in the county jail, or fine, or both.

There was evidence to establish that about 1 o'clock in the morning the defendant drove east on 28th Street, in Los Angeles, into the intersection of Griffith Avenue, where his car collided with one being driven north on Griffith Avenue by Sam Cason. Appellant's car crossed over Griffith Avenue and ran into the east curb. Three passengers in the Cason car were rather severely injured. Police officers soon arrived and found Gossman sitting in his car. Officer Barker testified that he smelled defendant's breath and it was strongly alcoholic; he asked him to walk a line and defendant was unable to do so; his car was examined and found to be in high gear. Defendant was taken to the receiving hospital and thence to the police station, where he was given a sobriety test. Officer Barker testified that in his opinion defendant was intoxicated. Officer McDowell testified that he smelled an alcoholic odor on defendant's breath. He and Cason and another witness testified that in their opinion defendant was intoxicated. Defendant stated that he had had two beers before supper, and thereafter only milk, and that when the accident occurred he was on his way to get a bottle of liquor for his wife. At the trial he denied that he had been drinking anything but milk and unfermented apple cider.

Defendant's contention on the appeal that there was insufficient evidence to prove he was intoxicated is not sustained by the record. It was for the trial court to determine whether the witnesses for the People were deceived by defendant's speech and actions after the accident and whether his appearance and conduct, as described by them, and which indicated to them intoxication, were due to something else. Upon the evidence we have mentioned, the finding on that issue is conclusive.

The point is made by defendant that he was wrongfully convicted of violation of section 502, under the information

charging violation of section 501, for the reason that the latter offense does not include the former. We think it is an included offense. Where different offenses are involved the rationale of the constitutional provision (Art. I, § 13), and the statutory rule (Pen. Code, § 1023), against double punishment is that punishment for either a greater or a lesser offense, where both are founded upon a common basic element, necessarily includes punishment for the other. As a rule, in either case, complete expiation is rendered by satisfaction of the judgment. A proper ground of distinction between included and nonincluded offenses is whether they involve essentially the same or different elements of conduct. If they have a common basis the greater is usually deemed to include the lesser. Thus, in offenses against the person, simple assault is included in the more serious offenses that involve acts of personal violence, for the reason that the latter cannot be committed without committing the former. Homicide cases, in which the greater offenses include the lesser, have a common basis in the unlawful killing of a human being. Various offenses involving the unlawful taking of property include theft as a lesser offense.

The difficulties which the courts often encounter do not arise out of doubts as to the general rules, but in analyzing the elements of similarity and dissimilarity of related offenses, in order to determine whether one is necessarily included in the other. We have no such difficulty in the present case. In addition to sections 501 and 502 of the Vehicle Code we have section 367d of the Penal Code, by which it is made a misdemeanor to become or be intoxicated while driving a motor vehicle. The Penal Code section, as limited by the Vehicle Code, relates to driving on private property (People *v.* Lewis, 4 Cal. App. 2d Supp. 775 (37 P. 2d 752)); section 502 to driving on a highway; and section 501 to driving either on private property or a highway in an unlawful manner, and so as to proximately cause bodily injury to any person other than the driver. While the offenses defined by sections 367d and 502 vary as to circumstances and section 501 encompasses additional circumstances, and consequences, all three offenses have a common root in drunk driving. In order to establish a violation

of section 501, it would be necessary to prove that the driving was done either on private property in violation of section 367d, or on a highway in violation of section 502. In a prosecution under 501, it is not necessary to charge also a violation of section 502 (People *v.* Stanley, 13 Cal. App. 2d 559 (57 P. 2d 146)); and for the reasons stated in that case it is not necessary to charge violation of section 367d. A conviction of violation of section 501 would undoubtedly bar a further prosecution under either of the other sections for the reason that they are included offenses. We conclude that in a prosecution under 501 the accused may be convicted of violation of either section 502 or 367d. So closely allied are the offenses defined in the former and the latter sections that it would have been logical for the Legislature to make driving while intoxicated a single offense, punishable as a misdemeanor in the circumstances specified in sections 502 and 367d, and as a felony under the conditions stated in section 501. (See People *v.* Kehoe, 33 Cal. 2d 711 (204 P. 2d 321).)

We have examined the many other points argued by appellant and find them without support in the record, or lacking in merit for other reasons.

The judgment is affirmed.

(8863)

IN THE

Supreme Court of the United States

October Term, 1950

No. 642

Jos. Gassman,

Appellant, Petitioner,

vs.

The People of the State of California, *et al.*,

Respondents.

Petition for Rehearing as to Jurisdiction and for the Writ of Certiorari.

Jos. Gassman,
212 East Twenty-Eighth Street, Los Angeles 11,
In Propria Persona.

Parker & Company, Law Printers, Los Angeles, Phone MA. 6531.

TABLE OF AUTHORITIES CITED

STATUTES

Act of February 13, 1925, Chap. 229, 43 Stats. 936, Sec. 237(b) 4

Act of June 25, 1948, Chap. 646, Public Law 773 (H. R. 3214), 80th Cong., 2d Sess., as amended through June 15, 1949 1

California Vehicle Code, Sec. 317 3

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United States Code, Title 28, Sec. 2108 4

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United States Constitution, Fourth Amendment 4

United States Constitution, Fifth Amendment 4

United States Constitution, Sixth Amendment 4

United States Constitution, Eighth Amendment 4

IN THE

Supreme Court of the United States

October Term, 1950
No. 142.

JOE GOSSMAN,

Appellant, Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, *et al.*,

Respondents.

Petition for Rehearing as to Jurisdiction and for the Writ of Certiorari.

To the Honorable Justice William O. Douglas and to the Above Entitled Court:

Your appellant Joe Gossman respectfully petitions for a rehearing to invoke jurisdiction, also hereby applies for a writ of certiorari, supported by his brief on file herein containing jurisdictional statements, that in addition to those on file herein, your appellant sets forth the following jurisdictional statements, authorities and grounds under the Act of June 25, 1948, Ch. 646, Stat. P. L. 773 (H. R. 3214), 80th Congress, Second Session, as amended through June 15, 1949, enacting into law Title 28, United States Code in which the rules for the Court shall be consistent with Acts of Congress. There is no Act of Con-

gress specifically prescribing that a "Federal question" must first be proven so as to confer jurisdiction on this Court. That the only place where jurisdictional authorities must be drawn in question, set forth, or claimed under section 1257 T. 28, U. S. C., is where and when application is made for review, appeal, or certiorari in this Honorable Court and appellant is claiming for his rights, etc., as specially SET UP under the Constitution or Statutes of the United States with the same force and effect as if herein set forth and repeated at length.

With reference to the question of validity, the (State of California) "Vehicle Code" and section 502 on the ground of its being repugnant to the Constitution or laws of the United States. In addition to the grounds set forth in appellant's statement as to jurisdiction including those on pages 15, 16, 17, 18 and 19 of his printed brief, it is shown that section 502, Vehicle Code is also repugnant to Article I, section 10, paragraph 1 of our Constitution and has been retroactive since the year 1947 as an *ex post facto* law having been written and made after section 501 with which your appellant in this case was charged and found not guilty but was instead unlawfully convicted of the violation of section 502, Vehicle Code, with retrospective effect in opposition to the due administration of the laws or Government and if the judgment can be lawfully affirmed, your petitioner is entitled to redress for damages and loss suffered in having been unlawfully restrained of his liberty and imprisoned under false pretense for a period of 76 days and nights, in addition thereto appellant lost 500 days of employment as a result

thereof which equals the sum of $12,100.00 and defendant's car was damaged to the extent and sum of $700.00. That the record shows Sam Cason was the proximate cause of the accident. Budget Finance Plan were legal owners of Sam Cason's Buick car.

That appellant's license was revoked and the United States Supreme Court can be the only Court of competent jurisdiction under section 317, Vehicle Code, and because the Vehicle Code as well as section 502, designates no State boundaries declaring as follows:

> "It is unlawful for any person 'who is under the influence of intoxicating liquor' to drive a vehicle upon any highway."

That the pertinent provisions of said invalid statutes have been appropriately summarized and/or in both of appellant's briefs from the lower court and his printed brief on file herein, also in other papers including a motion to act on appeal as petition for writ of certiorari mailed to be filed with printed brief in which section 1257, paragraph 3, Title 28, U. S. Code, is well construed and its jurisdictional authorities are drawn in question, specially set up or claimed under the Constitution, statutes, or laws of the United States as shown by reference therein your petitioner was unreasonably seized and committed without probable cause, denied the right to bail, deprived of his liberty and property without due process of law, that a fair and impartial trial was not had nor intended, and your petitioner was unlawfully convicted under an *ex post*

facto law, inflicted with attainder and/or is now being subjected to the deprivation of rights, privileges or immunities specially set up under the Constitution or statutes of the United States, and your petitioner believes jurisdiction is conferred by virtue of Title 28, U. S. Code, sections 1251, 1257, 2103, 2106, 2108, and 2111; that if his appeal to the Supreme Court of the United States is improvidently taken, this alone shall not be ground for dismissal; but that all papers and briefs whereon the appeal was taken SHALL be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken; that the Supreme Court may vacate any judgment and direct the entry of an appropriate judgment.

ALSO the Act of February 13, 1925, chapter 229, 43 Statutes 936, section 237(b), "and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied," and by virtue of section 2111, Title 28, U. S. Code, "the Court shall give judgment after an examination of the record without regard to errors or defects." That your petitioner's substantial rights have been denied and continue to be effected against the validity of the foregoing and above mentioned Acts of Congress or statutes and Constitution, Article I, section 10, paragraph 1, Article VI, section 1, Amendments IV, V, VI, VIII, and statutes claimed under as set forth in appellant's briefs and papers on file herein.

WHEREFORE, your petitioner prays that a writ of certiorari be granted, for review in the matter of *The People of the State of California v. Joe Gossman,* from the District Court of Appeal of the State of California, Second Appellate District, Division III, No. 4380; that the judgment and affirmance be vacated; and your petitioner Joe Gossman prays judgment against (the People of) the State of California, County of Los Angeles Superior Court, the Los Angeles Police Department, Kermit J. Morgan, Walter S. Gates, in the sum of twelve thousand and one hundred dollars ($12,100.00), and in the sum of seven hundred dollars ($700.00) plus interest against the Budget Finance Plan and Sam Cason. Also prays for costs and such other relief as may be just and proper.

In further argument for the Court's order for issuance of the writ of certiorari and hearing by review in this Honorable Court, your petitioner respectfully presents the following:

Supporting brief in accordance with your rule 38 was mailed May 18, 1950, but was dated 1949 by mistake. It has been well established that the statutes must be construed and shall be the rule of decision in derrogation of the common law; also it has been so held that there is no vested right in the rule of a Court, including decisions handed down to be used as a rule of law, and by virtue of the Act of May 24, 1949, amended section 2071, Title 28, U. S. Code. Your petitioner believes that if any rules consistent with Acts of Congress and rules of prac-

tice and procedure have been prescribed by the said Court, such rules can only apply to attorneys and/or practicing law merchants. That the validity of said section including those set forth hereinbefore, have been drawn in question, and Congress did specially set up those rights, privileges and/or immunities to which your petitioner is entitled with the same force and effect as if set forth *verbatim* herein, and at all times your petitioner has claimed under the Constitution and statutes of the United States for his rights as set forth.

That the Attorney General for the appellee and respondents did not set forth nor mention or cite any substantial authority whatsoever to authorize a dismissal, and under section 2103 your petitioner is entitled to a review and hearing by writ of certiorari, and therefore moves this Honorable Court for such writ as if duly presented on the 27th day of March, 1950, and allowed on the 10th day of April, 1950. (Title 28, U. S. Code, sec. 2103, etc.)

Respectfully submitted,

JOE GOSSMAN,

In Propria Persona.

Affidavit and Certificate.

State of California, County of Los Angeles—ss.

Joe Gossman, being first duly sworn, deposes and says: That he is the petitioner in the foregoing application for the writ of certiorari and petition for rehearing and hereby certifies the same is presented in good faith and not for delay, but instead affiant has been prevented from exercising and having his rights enforced by any attorney or officer of the Courts of California, and believes the aforementioned authorities confer jurisdiction in the Supreme Court of the United States, that under sections 1237 and 2103, Title 28, U. S. Code, at the proper time to be filed with his printed brief, affiant mailed a motion to act on petition for appeal as a petition for writ of certiorari. That affiant is a citizen of the United States entitled to those inalienable rights, privileges and immunities as specially SET UP by Congress under the Constitution, statutes and laws of the United States with the same force and effect as if herein set forth and repeated at length or set out *verbatim*.

That affiant has read the above and foregoing petition and knows the contents thereof and that the same is true of his own knowledge, information, or belief. So help me GOD.

JOE GOSSMAN.

Subscribed and sworn to before me this 6th day of December, 1950.

MARGUERITE F. CRIPPS,
Notary Public in and for the County of Los Angeles, State of California.

No. 142. GOSSMAN v. CALIFORNIA ET AL. Appeal from the District Court of Appeal of California, Second Appellate District. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. Appellant *pro se*. *Fred N. Howser*, Attorney General, and *Frank W. Richards*, Deputy Attorney General, for the State of California, appellee. Reported below: 95 Cal. App. 2d 293, 212 P. 2d 585.